



“The Good, the Bad and the Ugly: Insolvency and Restructuring in Latin America”

Brazil’s New Bankruptcy Law



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PART II - Issues yet to be improved



PART I - Enhancements brought by the New Law

- *General View of the Changes*
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PART II - Issues yet to be improved

General view of the changes

Current Law

(Decree-Law 7661/45):

- Outdated (1945).
- Does not allow insolvent companies to recover.
- Dismantles companies facing difficulties.
- Inefficient as means of recovering credits.

New Law

(Law 11.101/05)

- Enacted on Feb. 9, 2005. In force on June 9, 2005
- Focuses on the recovery of distressed businesses.
- Aims at keeping companies as going concerns.
- Enhances the chances of credit recovery.

General view of the changes

Current Law

- Claim Priority: Tax credits have priority over secured and unsecured credits.
- Labor claims have absolute priority over all other credits, including tax credits.
- Insolvency options: (i) bankruptcy, and (ii) "concordata".

New Law

- Secured claims will have priority over tax claims.
- The preference of labor claims will be limited to the amount of 150 minimum salaries.
- Insolvency options: (i) bankruptcy, (ii) Judicial Restructuring; (iii) Extra-judicial Restructuring (Pre-packaged).

General view of the changes

Current Law

- The purchaser of a distressed business was held liable for the seller's tax and labor past liabilities.
- Entities subject to "concordata" are never offered credit.

New Law

- It is now possible to sell distressed companies as going concerns at the inception of the bankruptcy proceeding / judicial restructuring, without the purchaser succeeding the debtor in tax and commercial obligations.
- Fresh funds made available to entities being restructured will enjoy absolute repayment preference in the event of bankruptcy.



The focus of the New Law

Under the new law, all crucial decisions such as the decision to restructure or to liquidate a debtor company shall be taken by the creditors and only then approved by the court of competent jurisdiction.

Judicial Restructuring

- All credits, whether matured or not, existing at the time that the restructuring is being proposed, may be subjected to the effects of the restructuring.
- Exceptions apply to tax credits (which may be paid in installments), some advances on exports, credits deriving from leasing, conditional sale, and chattel mortgage operations.
- The approval of the judicial restructuring plan requires the vote of at least 50% of the creditors at a general meeting of creditors and of creditors representing at least 50% of the outstanding credits in each class of creditors (secured, unsecured and employees) attending such meeting.

Judicial Restructuring

- Parties shall have 180 days from the date of the filing in order to reach an agreement to restructure the insolvent company.
- If an agreement is not reached within this time frame, the insolvent company shall be liquidated.
- The debtor shall continue to be in charge of the administration of the company during restructuring (debtor in possession), unless the court decides otherwise in view of illegal acts performed by the debtor.

Judicial Restructuring

- The New Law permits any type of restructuring mechanisms, such as: payment extensions, partial or total sale of assets, leasing of assets, formation of wholly owned subsidiaries to which the business will be transferred, employee buy outs, transfer of assets to creditors, or any other.

Extra-Judicial Restructuring

- Negotiation of a restructuring plan directly with the creditors.
- The plan may encompass all of one or more categories of credits (excluding labor and tax credits).
- The ratified plan binds all the creditors of all the credit categories included in the plan, as long as the plan is signed by creditors that represent more than 3/5 of all the credits included.
- The court decision that ratifies the extra-judicial restructuring plan is binding and enforceable.



Issues yet to be improved

- i. Cross-border insolvencies still lack regulation in Brazil;
- ii. Judicial Restructuring is conditioned to the presentation of tax clearance certificates – repayment schedules currently envisaged are unsatisfactory;
- iii. The end of tax and labor succession should be extended to other situations other than judicial sales of business units;
- iv. The career of the judicial administrator (former trustee / inspector) needs to be further regulated.
- v. Intensive training of Judges and public attorneys is required.



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